87-2047
No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States
OCTOBER TERM 1987

JAMES B. FEASTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Is the actual filing of a return, affidavit, claim or other document a required element of a prosecution under 26 U.S.C. sec. 7206(2)?

PARTIES

The caption of the case in this Court contains the names of all the parties to the instant Petition.

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THE OPINION BELOW

The lower court's opinion is unpublished. It has been reproduced as Appendix A hereof, and is cited as United States v. James B. Feaster, unpublished op., No. 87-1340 (6th Cir. 1988).

JURISDICTION OF THIS COURT

The United States Court of Appeals for the Sixth Circuit entered its Opinion and Judgment on April 15, 1988. No motion for rehearing was filed and the mandate issued on May 19, 1988. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. sec. 1254(2) and Supreme Court Rule 20.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS

26 U.S.C. sec. 7206(2) provides in pertinent part:

> Any person who —
>
> (1)***
>
> (2) Aid or assistance. — Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document; . . . shall be guilty of a felony . . .

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person . . . shall be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

The petitioner, James Morris, is an attorney specializing in income tax law. He is licensed in the state of Michigan and offices in Detroit, Michigan. Defendant was charged in an eleven-count indictment. One of the offenses charged was advising in the preparation of false tax returns under 26 U.S.C. sec. 7206(2). The sec. 7206(2) charge resulted from a conversation Defendant had with an informant for the Internal Revenue Service in which the Defendant orally advised the informant in questionable methods by which to reduce tax liability. The informant *never prepared or presented any return, affidavit, claim or other document* based on the advice, nor

did Defendant provide any written materials or aid in the preparation or presentation of any documents.

The Defendant filed a pretrial motion to strike the sec. 7206(2) count of the indictment on the grounds that no return had ever been filed, and therefore, no crime had yet been committed. The motion was denied. On January 28, 1987, the jury returned a verdict of guilty on the sec. 7206(2) count, as well as to counts alleging tax evasion, obstruction of justice, wire fraud, and theft of government property. Defendant was found not guilty on six other counts alleged in the indictment.

Defendant appealed his convictions to the United States Court of Appeals for the Sixth Circuit. Five points of error were raised. Point of error number two asserted the government failed to prove that a false or fraudulent return was filed and, therefore, an element of 26 U.S.C. sec. 7206(2) was not charged and proved. A panel of the Sixth Circuit, consisting of Jones, Wellford and Boggs, J.J., reversed and remanded the conviction for theft of government property, but affirmed the convictions in all other regards.

The Sixth Circuit framed the sec. 7206(2) issue as follows: "Is filing of a tax return a required element of 26 U.S.C. sec. 7206(2)?" After a cursory treatment of the issue, the court denied relief on the basis of *United States v. Maius*, 378 F.2d 716 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967). The court conceded that *Mauis, supra*, was factually distinguishable in that a return *had actually been filed* by the defendant in that case, yet went on to rule that *Mauis, supra*, was controlling.

REASONS FOR GRANTING THE WRIT

1. Among the Circuits that have addressed this issue there is a split of authority. The Ninth Circuit has held that the filing of a return, affidavit, claim or other document is a necessary element of the prosecution. *See, United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984); *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448 (9th Cir.), *cert. denied*, 106 S.Ct. 3301 (1986). *See also, United States v. Crooks*, 804 F.2d 1441 (9th Cir. 1986) (false returns were filed). *C.f., United States v. Perez*, 565 F.2d 1227 (2d Cir. 1977) (in order to convict under sec. 7206(2), the government must show the defendant aided, assisted, procured, counseled, advised or caused the preparation *and* presentation of a return). In addition to the ruling of the Sixth Circuit in the instant case, the Fifth Circuit has also held that a claim or return need not be filed to invoke liability. *United States v. Wolfson*, 573 F.2d 216 (5th Cir. 1978). This Court should address the issue to resolve the dispute of authorities.

2. The Sixth Circuit has decided a federal question in a way in conflict with the applicable decisions of this Court. In *United States v. Habig*, 390 U.S. 222 (1968), this Honorable Court specifically stated that the crime of fraudulent preparation of a tax return is "committed at the time the *return is filed*," *Id.* at 223. *See also, United States v. Wyman*, 125 F. Supp. 275 (W.D.Mo. 1954); *United States v. Newton*, 68 F.Supp. 952 (W.D.Va. 1946). The Sixth Circuit has apparently ignored or overlooked the *Habig* decision, *supra*, as no mention of it was made in the their opinion.

3. The incorrect analysis and reasoning of the Sixth Circuit represents a departure from the usual course of judicial proceeding that should not be sanctioned by this Court. Not only has the Sixth Circuit ignored the binding precedent of *Habig, supra*, the court's reliance upon *Mauis, supra*, is misplaced.

As noted above, the Mauis decision, *supra*, while it may be good law within the Sixth Circuit, it is clearly factually distinguishable. The Sixth Circuit framed the issue in terms of whether the filing of a return was a required element, then used *Mauis, supra*, a case in which a return *was filed*, to dispose of the issues in a case in which *no return, affidavit, claim or other document was ever filed by anyone.*

4. The Sixth Circuit, through judicial construction, has extended statutory language to criminalize conduct. This is not constitutionally permissible. *See for example, McNally v. United States*, 483 U.S. ____, 107 S.Ct. ____, 97 L.Ed.2d 292 (1987), where this Court held the federal mail fraud statute was limited to the protection of property rights and did not cover the intangible right of the citizenry to honest conduct in public office. The Court specifically held there can be no constructive offenses; before one can be punished, it must be shown that his case is plainly within the statute. The Court also reaffirmed that where there are two rational readings of a statute, one harsher than the other, the harsher can be chosen only when Congress has spoken in clear and definite language. 97 L.Ed.2d at 302. Moreover, it is a well-established axiom of Anglo-American jurisprudence that a defendant in a criminal action has the right to notice of what constitutes criminal conduct. The failure to provide such notice amounts to denial of due process of law, in violation of the Fifth Amendment to the United States Constitution.

5. The confusion that currently exists on this issue is such that intervention by this Court is appropriate. The confusion is perhaps best demonstrated by the opinion of the lower court. In addition to the misplaced reliance on *Mauis, supra*, discussed at length above, the Sixth Circuit also cited in support of their position the following: *United States v. Kelley*, 769 F.2d 215 (4th Cir. 1985); *United States v. Nealy*, 729 F.2d 961 (4th

Cir. 1984); and *United States v. Holecek*, 739 F.2d 331 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985). All of those cases are clearly distinguishable from the instant case. Every single one of those cases involved a situation in which a return, affidavit, claim or other document had been filed — as the statute plainly requires. What the statute does not make clear is whether the action can be maintained where no false or fraudulent materials have been filed. That was the issue before the Sixth Circuit. The precedents relied upon by that court do not support the conclusion reached in the opinion. Intervention on these grounds is merited due to the fact that the issue presented is bound to recur in the future. Numerous prosecutions arise every year on the basis of 26 U.S.C. sec. 7206(2). The number of tax preparers and others who give advice and lend aid to taxpayers is substantial and their interests are clearly impacted by this ruling. Clarification of the issues will bring a degree of certainty to this area that is presently lacking and will not only protect the rights of the citizenry, but aid in the effective enforcement of the provisions of the Act by clearly establishing the requisite elements of prosecution.

CONCLUSION

This Honorable Court should grant the instant Petition to resolve the circuit conflict and eliminate the confusion and uncertainty in 26 U.S.C. sec. 7206(2) prosecutions. It should also grant this Petition to clarify the intent of the statute and bring the decisions of the Sixth and Fifth Circuits in line with this Court's ruling in *United States v. Habig*, 390 U.S. 222 (1968).

Respectfully Submitted,

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NOT FOR PUBLICATION
FILED APR 15 1988
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 87-1340

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JAMES B. FEASTER, *Defendant-Appellant.*	))))))	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

DECIDED AND FILED April 15, 1988

BEFORE: **JONES, WELLFORD, and BOGGS**, Circuit Judges.

PER CURIAM. Appellant, James B. Feaster ("Feaster"), found guilty in five counts of an eleven count indictment, challenges his convictions based upon claims of outrageous governmental conduct, insufficiency of evidence, and denial of a fair trial. An investigation of appellant was pursued by the IRS spanning a number of years. Appellant, a tax attorney, contends that the government's investigation and his resulting convictions were based upon a government vendetta against him.

IRS Special Agent Kraft began to investigate appellant for potential tax violations. In July 1985, appellant shared a flight with an SEC attorney, Fusfeld, and, according to Fusfeld, described his representation of criminal defendants to avoid tax problems in connection with income realized from illegal activities. When this information from Fusfeld became known,

the IRS mounted an undercover operation in an effort to obtain evidence that appellant in fact engaged in advising and assisting individuals in filing false tax returns and in other criminal activities. That undercover operation resulted in contact by an agent investigator, Terrence Johnson, ("Johnson") wherein appellant gave specific and lengthy advice to Johnson regarding methods of deceiving the IRS.

The investigation of appellant further revealed activities on behalf of one Velma Bailes which included the filing of false responses to interrogatories in an effort to make a claim against money seized from Bailes's residence relating to illegal drug activity. Appellant was paid $25,000 by the government for what was asserted to be unauthorized representation of Javern Davis in the same forfeiture proceeding in which Bailes was involved. Furthermore, the investigation of appellant revealed that he had understated his taxable income in his 1979 income tax return.

Based upon these activities of Feaster revealed through the IRS investigation, the government sought and obtained an indictment against appellant for eleven counts of various violations of federal laws. (In count one with tax evasion in 1979; in count two with tax evasion in 1980; in count three with obstruction of justice for falsely claiming to represent Davis in the forfeiture proceeding; in count four with obstruction of justice for filing a false assignment from Davis; in count five with obstruction of justice for falsely claiming to represent Bailes; in count six with obstruction of justice for filing false and fraudulent interrogatory answers purporting to be those of Bailes; in count seven for theft of government property for the $25,000 paid to him for his representation of Davis; in count eight for mail fraud in connection with his alleged representation of Bailes; in count nine for wire fraud based upon the scheme to defraud the IRS; in count ten for wire fraud also

in connection with the scheme to defraud the IRS, and; in count eleven for violation of 26 U.S.C.§ 7206(2) for advising the preparation of false tax returns.) The jury found appellant guilty of counts one, six, seven, ten and eleven only.

Appellant contends that the conduct of the government in this case was outrageous and this denied him due process in accordance with the standards set forth by this court in *United States v. Brown*, 635 F.2d 1207 (6th Cir. 1980), and its progeny. Appellant contends that the telephone call relied upon by the government in convicting appellant pursuant to count ten of the indictment was manufactured by the government in violation of appellant's due process rights, relying primarily upon *United States v. Archer*, 486 F.2d 670, 681 (2d Cir. 1973). Appellant further contends that the government abused the grand jury process by utilizing the IRS agent as the sole witness before the grand jury, but using only other individuals as witnesses at trial so that defendant was deprived of knowing about their prior testimony. Appellant asserts that Bailes was a perjurer and that Davis's testimony was obtained by the IRS's agreement to release a lien against him. Appellant claims that raising the count nine charge involving an eleven-year long alleged scheme to defraud was prejudicial to appellant, since he was acquitted of that charge. Finally, appellant contends that the information concerning the inducement for Davis to testify was not provided to him in violation of the rules set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

The government responds that the telephone call upon which count ten was based was the result of legitimate investigative techniques. With respect to alleged grand jury abuse, *Costello v. United States*, 350 U.S. 359, 363, *reh'g denied*, 351 US. 904 (1956), stands for the proposition that "[a]n indictment returned by a legally constituted and unbiased grand jury . . .

if valid on its face, is enough to call for trial of the charge on the merits." In *Costello*, the Court reaffirmed its refusal to quash an indictment where evidence before the grand jury was incompetent or in the nature of hearsay. *United States v. Mechanik*, 475 U.S. 66 (1986), holds that appellant's convictions render harmless any alleged error of the type asserted in respect to the grand jury proceedings.

In sum, after considering each of appellant's contentions, we conclude that appellant has demonstrated no outrageous governmental conduct which would justify reversal of his convictions.

I. Is filing of a tax return a required element of 26 U.S.C. § 7602(2)?[1]

Appellant relies upon *United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984), which found that "the filing of a return is in fact an element of a section 7206(2) violation." In only one other case was *Dahlstrom* cited for the proposition now before us, in *United States v. Shortt Accountancy Corp*, 785 F.2d 1448 (9th Cir.), *cert. denied*, 106 S.Ct. 3301 (1986).

Appellee relies upon *United States v. Kelley*, 769 F.2d 215 (4th Cir. 1985); *United States v. Maius*, 378 F.2d 716 (6th

[1]26 U.S.C. 7206(2) provides that a felony is committed by any person who:

> wilfully aids or assists in, or procures, counsels, or advises the ***preparation or presentation*** under, or in connection with any matter arising under, the Internal Revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document . . . (emphasis added).

Cir.), *cert. denied*, 389 U.S. 905 (1967); *United States v. Nealy*, 729 F.2d 961 (4th Cir. 1984), and; *United States v. Holecek*, 739 F.2d 331 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985), which deal with a situation in which the defendant provided extensive assistance in preparation of a tax return ultimately filed by someone else. In each case, the defendant contended that he could not be held guilty of a violation of the tax laws since he did not actually file the false return. In *Kelley*, *Maius*, *Nealy*, and *Holecek*, the court held that assistance in preparation was sufficient for the prosecution. None of these cases, however, deal with the situation where the ultimate filing of the tax return did not take place, which is the situation involved in count eleven.

We conclude that *Dahlstrom* is contrary to the plain language of 26 U.S.C. § 7206(2). That statute provides that a violation occurs if a person aids, assists, counsels, or advises the preparation *or* presentation of a fraudulent tax return. We believe the authority of *Maius*, previously decided in this circuit, is sufficient to sustain prosecution based upon aiding in preparation of a false return without the necessity of the return being filed.

II. Sufficient evidence.

The oft-reiterated standard for sufficiency of the evidence to support a criminal conviction "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1978), *reh'g denied*, 444 U.S. 890 (1979) (citations and emphasis omitted).

With respect to count one, appellant contends that there was no evidence that he prepared or signed the tax return

in issue, and contends that two of the three disputed items were reported and not concealed. The charge of tax evasion was based upon (1) appellant's failure to claim interest income on a loan, (2) manipulative reporting of a property capital gains transaction, and (3) inappropriate deduction of an alleged $10,000 settlement.

Upon an examination of the return in question and the evidence relating to its preparation and filing, we are satisfied that the evidence in this case meets the *Jackson* standards as to count one.

With respect to count six, appellant contends that the contradictory testimony of Bailes, an admitted perjurer, cannot support the criminal charge against him unless there was some additional evidence to support that charge. Appellant also contends that Bailes's testimony was inherently incredible. Here we find that Bailes gave a rational explanation for the conflicts between her previous actions and her testimony in this case and her testimony is sufficient to support appellant's conviction on count six if believed by the trier of fact. It was for the jury to resolve Bailes's credibility in light of her known background and her relationship with Feaster. With respect to count seven, appellant makes a similar argument concerning the testimony of witness Davis which we find is similarly without merit.[2]

In *Giglio v. United States*, 405 U.S. 150, it was held that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence . . . [a] new trial is required if the false testimony could . . . in any reasonable likelihood

---

[2]Davis, in his testimony,responded to questions by appellant's attorney regarding whether *Feaster* was instrumental in having the lien removed by stating "I don't know, sir." Appellant's attorney did not pursue this further on cross-examination.

have affected the judgment of the jury. . . ." 405 U.S. at 154 (citations omitted).

Davis had a very large loan released by the government, and was apparently the sole witness in support of the government's count seven charges against appellant. We conclude that a new trial is justified on count seven for the prosecution's failure to disclose to appellant prior to trial in accordance with his request the arrangement between Davis and the government in light of these circumstances.

Appellant attacks count ten on the ground that the telephone call was "manufactured" and that the government failed to prove beyond a reasonable doubt the existence of the alleged scheme. He points out that his purported statements made to Fusfeld and Johnson were uncorroborated, citing *Smith v. United States*, 348 U.S. 147 (1954). There is, however, a distinction between an out of court admission made during the commission of the crime and an out of court admission made following the commission of the crime. In the former situation, corroboration of the admission is unnecessary. *United States v. Pennell*, 737 F.2d 521, 537 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1958). In the present case, the statements made to Johnson were made in the course of the commission of the crime and are sufficient to support appellant's conviction under count ten.

With respect to count eleven, appellant reiterates his argument that an essential element of 26 U.S.C. § 7206(2) was not proved and his argument that his conversations with Johnson were not corroborated. Those contentions have been addressed, and we hold that there was sufficient evidence to support the conviction of appellant pursuant to count eleven and all the other counts save count seven.

III. Did defendant receive a fair trial?

Appellant argues that the government's violation of *Giglio* and the failure of the trial court to strike count nine which contained inflammatory language concerning appellant's advice to drug traffickers resulted in deprivation of a fair trial. The violation of *Giglio* is adequately addressed by requiring a new trial on the issues presented in count seven. The remainder of appellant's contentions are insufficient to indicate that he did not receive a fair trial. He was acquitted on a number of counts. We have considered each of the contentions of appellant, singly and in combination, and we are satisfied that he received a fair trial. Appellant's conviction for theft of government property pursuant to count seven of the indictment is *REVERSED* and *REMANDED* for a new trial. In all other respects the convictions are *AFFIRMED*.
ISSUED AS MANDATE: May 19, 1988

COSTS: NONE

A TRUE COPY

Attest:JOHN P. HEHMAN, Clerk
By Tom Bluminthal
Deputy Clerk

(2)

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the filing of a tax return is a required element of the offense of willfully counseling or advising the preparation or presentation of a false income tax return, in violation of 26 U.S.C. 7206(2).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 843 F.2d 1392 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1988. The petition for a writ of certiorari was filed on June 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of attempted tax evasion for 1979, in violation of 26 U.S.C. 7201 (Count 1); obstruction of justice, in violation of 18 U.S.C. 1503 (Count 6); theft of government property, in violation of 18 U.S.C. 641 (Count 7); wire fraud, in

violation of 18 U.S.C. 1343 (Count 10); and counseling or advising the preparation or presentation of a false income tax return, in violation of 26 U.S.C. 7206(2) (Count 11). He was acquitted of six other counts against him. The district court sentenced him to five years' imprisonment and a $10,000 fine on Count 1. In addition, the court imposed concurrent terms of five years' imprisonment on Counts 6 and 7, a concurrent term of three years' imprisonment on Count 11, and a consecutive five-year term of probation on Count 10.

1. The evidence pertaining to Count 11, which is the only count that petitioner contests in this Court, was as follows: The Internal Revenue Service began an undercover investigation of petitioner, a tax attorney, after receiving information that he was assisting individuals in filing false tax returns (Pet. App. A1-A2). During the investigation Terrence Johnson, an IRS undercover investigator posing as a narcotics dealer, met with petitioner on several occasions. Two of the meetings, which occurred in December 1985 and January 1986, were recorded on videotape. In the course of those meetings, petitioner gave Johnson detailed advice about avoiding the payment of taxes on income realized from illegal narcotics trafficking.

Petitioner advised Johnson that he should not report all of his income on his federal income tax return; that, in response to the question on the federal income tax return concerning the source of his income, he should claim his Fifth Amendment privilege against compulsory self-incrimination; that Johnson should not tell petitioner how much money Johnson had earned in his narcotics business, because then petitioner and Johnson would become co-conspirators in a conspiracy to evade taxes; and that Johnson should use petitioner's address on his federal income tax return. Petitioner also told Johnson that he

should invest the proceeds from his narcotics business in legitimate businesses; that he should hide his money in safe deposit boxes registered in other persons' names; and that he should use nominees for his investments or expenditures of money. Gov't C.A. Br. 7-10.

During their meetings, petitioner repeatedly emphasized that Johnson should report as income only those expenditures that could be traced, plus a "cushion" to cover any income that might be subject to verification. Petitioner also provided Johnson with a worksheet that he told Johnson to complete and return to him. Petitioner explained that he would use the worksheet to prepare Johnson's federal income tax return. Gov't C.A. Br. 9.

When Johnson completed the worksheet, he and petitioner met again to review the worksheet and to discuss any other information petitioner needed to prepare Johnson's income tax return. During the meeting, petitioner reiterated the advice he had given Johnson earlier, and he told Johnson to destroy any records he had relating to their discussions of the preparation of tax returns. Petitioner also tore off a portion of the worksheet on which Johnson had indicated that he had $3 million in his safe deposit boxes. Petitioner destroyed that portion of the worksheet by eating it. At the end of the meeting, petitioner also destroyed other documents, explaining that they constituted potential evidence. Petitioner then told Johnson that he would prepare Johnson's income tax return from the information Johnson had given him. Gov't C.A. Br. 9-11.

Johnson telephoned petitioner the following day. At that time, petitioner expressed some reluctance to deal with Johnson but agreed to meet with him again. Prior to the scheduled meeting date, however, petitioner told Johnson that he would not represent Johnson, because Johnson's case was "too heavy." Accordingly, no tax

return was prepared or filed as a result of petitioner's advice. Gov't C.A. Br. 11.

2. The court of appeals reversed petitioner's conviction on Count 7, which charged him with theft of government property, but it affirmed the four remaining convictions, including the conviction on Count 11, which charged petitioner with counseling the preparation of a false income tax return, in violation of 26 U.S.C. 7206(2) (Pet. App. A1-A28). In addressing petitioner's conviction on Count 11, the court of appeals concluded that the filing of an income tax return is not a required element of Section 7206(2). Pet. App. A4-A5. The court declined to follow the contrary decision of the Ninth Circuit in *United States* v. *Dahlstrom*, 713 F.2d 1423, 1429 (1983), cert. denied, 466 U.S. 980 (1984). Instead, the court relied on the plain language of Section 7206(2), noting that the statute provides in the alternative "that a violation occurs if a person aids, assists, counsels, or advises the preparation *or* presentation of a fraudlent tax return" (emphasis in original). Because petitioner had clearly counseled and advised the preparation of a fraudulent tax return, the court of appeals found that it was not necessary for the government to prove that a return was actually filed. Pet. App. A5.

ARGUMENT

We agree with petitioner that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Dahlstrom, supra*. Nonetheless, we believe that for several reasons review of the issue is not warranted at this time. First, the decision in this case is correct. Second, the issue does not arise with sufficient frequency to warrant review. And third, in light of the concurrent sentences petitioner received on the other counts on which he was convicted,

the resolution of the issue in this case would not have a significant effect on petitioner.

1. In *Dahlstrom*, a divided Ninth Circuit panel held that the filing of a tax return is an element of a Section 7206(2) violation. One of the defendants in *Dahlstrom* prepared a return for a person who was cooperating with an IRS investigation. The evidence showed that the cooperating witness never intended to file that return or represent it as his true return. 713 F.2d at 1426, 1429. The court of appeals reversed the defendants' convictions on the count relating to the preparation of that return in a brief passage in which the court concluded that prior decisions had established that a return must be filed in order for there to be a violation of Section 7206(2).[1]

In holding that filing a return is a necessary element of Section 7206(2), the *Dahlstrom* court relied on this Court's decision in *United States* v. *Habig*, 390 U.S. 222 (1968), and the Sixth Circuit's decision in *Butzman* v. *United States*, 205 F.2d 343, cert. denied, 346 U.S. 828 (1953). As Judge Goodwin recognized in his dissenting opinion in *Dahlstrom*, 713 F.2d at 1430-1431, however, the cases cited by the majority did not hold that the filing of a return is a necessary element of a Section 7206(2) offense, but only that *if* a return is filed, the offense is deemed to be complete at the time of filing. See *United States* v. *Habig*, 390 U.S. at 223; *Butzman* v. *United States*, 205 F. 2d at 350-351. The question decided by those cases was when the statute of limitations begins to run for the offense of aiding the preparation and filing of a false return (see *Habig*, 390 U.S. at 222; *Butzman*, 205 F.2d at 346). Those cases did not address the separate question whether

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[1] The government sought certiorari in *Dahlstrom*, but not on the issue presented in this case. This Court denied the government's petition. 466 U.S. 980 (1984).

proof that a return was actually filed is required in a prosecution for counseling and advising the preparation of a false return.[2]

The court of appeals in this case was correct in concluding that the plain language of Section 7206(2) is sufficient to resolve this case. By its terms, the statute prohibits aiding or advising either the preparation or the presentation of a fraudulent income tax return. The offense, therefore, can be committed simply by counseling a taxpayer to file a false return; nothing in the statute suggests that the taxpayer must follow that advice and actually file the return in order for the offense to be committed. Indeed, if Congress had intended to require the filing of a return, it is unlikely that it would have made it unlawful to counsel the "preparation" as well as the "presentation" of a false return.

The policy underlying Section 7206(2) also supports the court of appeals' construction of the statute. Corrupt advice endangers the internal revenue system regardless of whether false returns are actually prepared or filed. Each instance in which corrupt advice is given carries with it the threat that a false return will be filed and the collection of the revenues impeded. It would hardly further the efficient administration of the tax laws if a dishonest tax preparer or advisor could escape punishment and continue his corrupt activities merely because of the fortuitous circum-

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[2] In dictum, the court in *Butzman* stated without extended discussion that no crime under Section 7206(2) would have been committed if the document had not been filed. 205 F.2d at 351. Because the issue in that case was when the statute of limitations begins to run in a case in which a return is filed, it was, of course, not necessary for the court to decide whether the actual filing of a document is an element of a Section 7206(2) violation. In light of the Sixth Circuit's ruling in this case that the filing of a return is not an element of a Section 7206(2) violation, it is clear that the dictum in *Butzman* is not considered to be binding even within its own circuit.

stance that the false return has not been prepared or filed when the activity is discovered.

2. Regardless of the merits of the question presented, there is no need for the Court to grant review in this case. There have been very few prosecutions under Section 7206(2) in which a return has not been filed. *Dahlstrom* and the instant case are the only such cases of which we are aware, and we do not anticipate that the frequency of such prosecutions will increase in the future. Moreover, because the decision in this case is unpublished, it is of limited precedential effect even within the Sixth Circuit, and it is not likely to have any effect on the administration of the tax laws outside of that circuit.[3]

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[3] Petitioner cites several other court of appeals decisions by way of suggesting that the conflict is broader than simply between this case and *Dahlstrom*. In fact, however, the other cases that he cites do not conflict with either this case or *Dahlstrom*. In *United States* v. *Crooks*, 804 F.2d 1441, 1448 (1986), and *United States* v. *Shortt Accountancy Corp.*, 785 F.2d 1448, 1453, cert. denied, 478 U.S. 1007 (1986), the Ninth Circuit simply cited *Dahlstrom* as standing for the proposition that a return must be filed in order to satisfy the requirements of Section 7206(2); neither of those cases, however, involved a prosecution in which a return was not filed. *United States* v. *Perez*, 565 F.2d 1227 (2d Cir. 1977), is even less pertinent. In that case—one in which a return was filed—the court of appeals simply summarized the elements of Section 7206(2) as requiring that the defendant "aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return" (565 F.2d at 1233-1234). Although the court referred to "preparation *and* presentation," rather than using the correct statutory term "or," that deviation from the statutory language does not appear to have been intended to have any particular significance. In any event, even the inclusion of the term "and" does not resolve the issue presented in this case, since petitioner advised both the preparation of a false return and the presentation of a false return. Even under the language used by the court in *Perez*, petitioner could properly be convicted in spite of the fact that a return was never actually filed. Finally, *United States* v. *Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978), is not in conflict with *Dahlstrom*, because

3. Not only will the Sixth Circuit's decision have little or no practical effect on the law, it will have only the most modest effect on petitioner himself. The court of appeals upheld petitioner's convictions on three other felony counts and imposed greater concurrent sentences on two of those counts. The only effect of the conviction on the one count that petitioner challenges in this Court is to impose on him an additional $50 special assessment under 18 U.S.C. (Supp. IV) 3013. In light of the de minimis effect of the Section 7206(2) conviction on petitioner, any review of the conflict among the circuits should be postponed at least until it becomes apparent that the conflict is likely to arise in more than the current total of two reported prosecutions in the 64-year history of the statute, which dates back to the Revenue Act of 1924 (see § 1017(c), 43 Stat. 344).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the *Wolfson* court simply held that a person does not have to be a "tax preparer" in order to be liable under Section 7206(2); the court did not address the question whether the filing of a return is an element of that offense.

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